STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN ROBERTS,

Plaintiff-Appellant,

V

OLD COUNTRY BUFFET, d/b/a BUFFETS, INC., and MICHAEL LONG,

Defendants-Appellees.

UNPUBLISHED
November 5, 2002

No. 233517
Wayne Circuit Court
LC No. 97-718331-NO

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff contends that the trial court erred in dismissing her premises liability claim because there were issues of fact to be decided. We disagree.

Plaintiff was an invitee in that she was on defendants' premises which were held open for a commercial purpose. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000). A landowner is subject to liability for physical harm caused to his invitees by a condition on the land only if the owner (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (b) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect his invitees against the danger. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433; 542 NW2d 612 (1995). This duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457

NW2d 117 (1990), lv den 437 Mich 987 (1991). It does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to open and obvious dangers. *Id*.; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover upon casual inspection. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993), lv den 445 Mich 862 (1994). A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001) (footnote omitted).

Assuming unattended small children constitute a dangerous condition, the condition was open and obvious, unattended small children being recognizable on sight. However, they do not present a high risk of severe harm in general or in this case in particular. The *Lugo* Court explained that a special aspect is one, for example, which the invitee could not avoid regardless of the care taken for his or her own safety. *Id*. at 518. The Court also explained that liability remains for an open and obvious danger which the invitee could avoid by exercising due care but which nonetheless presents a high risk of severe harm, e.g., an unguarded deep pit, which presents a risk of serious injury or death to the unobservant person who tumbles in. Such a condition would not include an ordinary pavement defect, which presents "little risk of severe harm" should an unobservant person trip over it and fall to the ground. *Id*. at 518, 520. An unattended child in a buffet line can be easily avoided and the danger caused by the child dropping a plate of food a few feet to the ground is not likely to cause serious injury or death (as compared, for example, to dropping a rock from a building or highway overpass).

Accordingly, the trial court correctly granted defendant's motion for summary disposition on plaintiff's premises liability claim.

Plaintiff also contends the trial court erred in dismissing her claim for breach of an assumed duty. Although defendants did not have a duty as a matter of law to identify the child who injured plaintiff or her parent(s) or guardian(s) for plaintiff's benefit, *Hakari v Ski Brule, Inc*, 230 Mich App 352, 360; 584 NW2d 345 (1998), plaintiff contends that they voluntarily assumed such a duty, citing *Panich v Iron Wood Products Corp*, 179 Mich App 136; 445 NW2d 795 (1989). Assuming *Panich* were applicable to this case by analogy, plaintiff failed to satisfy all the requirements the *Panich* Court deemed important; there was no evidence that plaintiff told Long why she wanted the information or that she needed it to pursue a possible tort claim. *Id*. at 138. Accordingly, we find no error in the trial court's ruling.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra